88-179

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM 1988

JONATHAN CLUB,
Appellant,

VS.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

JURISDICTIONAL STATEMENT

BAKER & MCKENZIE
JOHN R. SHINER
JANET A. KOBRIN
Citicorp Plaza
Thirty-Sixth Floor
725 South Figueroa Street
Los Angeles, California 90017
(213) 629-3000

Attorneys for Appellant
Jonathan Club

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTIONS PRESENTED

1. Whether the California Court of Appeal Opinion in the present case, or the conflicting Fifth Circuit Court of Appeals opinion in *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 872 (1976), accurately sets forth the law on the following issue: does a private party's lease of public lands, without more, create "state action" so that a state constitutionally may impose restrictions upon the private party's associational practices before the state issues a land-use permit to the private party solely involving other, *privately*-owned lands?

2. Whether the procedures followed in this case, which are purportedly authorized by Sections 30001.5 and 30210 of the California Coastal Act and art. X, § 4 of the California Constitution, are unconstitutional under the Fifth and Fourteenth Amendments? Appellant contends its due process rights have been violated by the lower courts' construction of the aforementioned state statutes to authorize the following series of events: in proceedings to determine Appellant's entitlement to a coastal development permit, the California Coastal Commission ("Commission"), a state agency, heard no evidence whatsoever on the issue whether Appellant, a private club, had a discriminatory membership policy. The Commission gave no notice that the issue of Appellant's membership practices would be a part of the permit review process. (Indeed, the trial court expressly found there was no evidence of discrimination). Based upon this admittedly nonexistent showing, the Commission imposed, and the courts below upheld, a requirement that Appellant certify it does not discriminate before it could obtain a development permit that had nothing whatsoever to do with its membership policies or practices.

3. Whether Sections 30001.5 and 30210 of the California Coastal Act and art. X, § 4 of the California Constitution, as applied to Appellant in this case, are unconstitutional and/or void for vagueness under the First Amendment? Appellant contends that the courts below unconstitutionally have contravened this Court's holdings in *Roberts v. United States Jaycees*,

468 U.S. 609, 629-30 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940, 1945-48 (1987); and *New York State Club Ass'n, Inc. v. New York*, 56 U.S.L.W. 4653, 4656 (U.S. June 20, 1988), which holdings establish the factors which must be present before an organization's associational rights constitutionally may be regulated. The courts below have permitted a state to infringe upon Appellant's freedom of association and related rights, with no consideration of, or evidence concerning, the existence or nonexistence of these factors. Moreover, there are less restrictive alternatives to effectuate the state interest at issue.

4. Whether the State of California has violated the Contract Clause of the United States Constitution by attempting to modify unilaterally a contract it entered with Appellant to settle complex litigation in 1984, and add a new, inconsistent condition in 1985 regarding Appellant's membership practices?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those named in the caption of this Statement.

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JURISDICTIONAL STATEMENT

Appellant Jonathan Club ("Appellant") appeals from an Opinion of the California Court of Appeal, Second Appellate District ("Court of Appeal"), affirming a judgment against Appellant, review of which has been denied by the California Supreme Court.

OPINIONS BELOW

The Opinion of the Court of Appeal (Appendix A, *infra*, A-1 - A-24) was reported at 197 Cal.App.3d 884, 243 Cal.Rptr. 168 (1988), but has been decertified for publication by the California Supreme Court. The decision of the California Supreme Court denying review of the decision of the Court of Appeal (Appendix B, *infra*) is not reported.

JURISDICTION

The Opinion of the Court of Appeal, affirming the judgment against Appellant below, was entered on January 14, 1988. An order denying Appellant's petition for rehearing was entered

on February 3, 1988. (Appendix C, *infra*). The order of the California Supreme Court denying Appellant's petition for review in that court was entered on May 5, 1988. Notice of Appeal to this Court was filed on July 26, 1988. (Appendix D, *infra*).

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1257, subdivision (2) of the United States Code. (Certiorari jurisdiction over this case also exists under Title 28, Section 1257, subdivision (3) of the United States Code.) The California Supreme Court having declined to review this case, the Court of Appeal Opinion is the "highest court of a State in which a decision could be had" within the meaning of Section 1257. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926). The time for filing the present Statement, however, is measured from the date of denial of review by the California Supreme Court. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions: the First, Fifth and Fourteenth Amendments to the United States Constitution; the "Contract Clause" of the United States Constitution (art. I, § 10, cl. 1); article X, § 4 of the California Constitution; and Sections 30001.5, 30210 and 30301 of the California Public Resources Code. The relevant text of these provisions is set forth at Appendix E, *infra*, E-1 - E-3.

STATEMENT OF THE CASE

Appellant is a private club located in downtown Los Angeles. Appellant also owns property on the Santa Monica beach, where it operates a second private facility. The present dispute between Appellant and the Commission arises from the Commission's attempt to make its issuance of a development permit to Appellant conditional upon Appellant's attestation that it

had a nondiscriminatory membership policy ("membership condition"). The Commission thereby sought to require Appellant, before Appellant could obtain such a permit, to certify that Appellant did not exclude members on the basis of race, sex or religion.

The Commission appeared to base its authority to impose the membership condition upon Appellant's lease of beach property from the State of California ("State") and upon powers the Commission claims are found in its enabling legislation, California Public Resources Code Sections 30000, *et seq.* ("Coastal Act"). This lease arrangement was part of a settlement agreement resolving litigation over a boundary dispute between Appellant and the State and City of Santa Monica ("City"). The settlement agreement, to which the State and several of its agencies were signatories, was totally silent as to any membership condition.

The lease arose out of the following facts. In 1974, the State (through the State Lands Commission and Department of Parks and Recreation) and City instituted litigation against the majority of beach front property owners in Santa Monica in an effort to quiet title to property seaward of a mean high-tide line which plaintiffs in that action contended was established in 1921. Appellant and the State both asserted that they owned the property in question. (Appellant had used the property without interruption for many years.) The litigation was protracted and complex and, in the case of Appellant, concluded in a settlement in 1984. In consideration of Appellant's relinquishment of its various claims (including that its property line was considerably seaward of that maintained by the State and City) and in consideration of certain concessions agreed to by the State, the parties settled the litigation. In one of the settlement documents, the "Lease Agreement with Options", Appellant leased the exclusive and unqualified use of the property in question. (C.T. pp. 471-504.)

Another of the settlement documents, the "Permit for Improvements and Lease Option Agreement", conveyed the State's approval for Appellant to implement certain agreed upon uses and improvements:

> "The Club intends to relocate two (2) of its paddle tennis courts, in accordance with plans now on file with the City and, at its option, may plant a flower bed along the waterward side of the Parcels, *all of which shall be deemed approved by the State and City concurrently with the execution of this Agreement.*"

(C.T. pp. 448-49, Emphasis added.) Appellant has complied with all terms and conditions of the Settlement Agreement.

On January 31, 1985, Appellant filed its Application for Coastal Development Permit ("Application"). The proposed "development" for which Appellant sought a permit was to remodel and add to a beach club facility *located solely on its fee-owned property.* The Application was reviewed and approved by the Commission's staff without any reference to the membership condition. On July 25, 1985, a hearing on the Application was held before the Commission. Not a single question was raised by the Commissioners concerning the development until an appearance by a representative of the Anti-Defamation League of B'nai B'rith ("ADL"). The ADL representative did not speak in opposition to the project, but simply requested the Commission consider imposition of an additional condition on issuance of the permit which had not previously been raised by anyone — one which would control Appellant's membership policy. As ultimately approved by the Commission, the membership condition required that:

> "Prior to the issuance of the permit, the Jonathan Club shall deliver to the Executive Director a statement that the club will not discriminate on the basis of race, sex or religion."

No evidence was ever presented at the July 25, 1985 hearing, at the August 30, 1985 hearing on Appellant's Request for Reconsideration, at the trial court or in the subsequent appellate proceedings that Appellant had a discriminatory membership policy, or that it discriminated. There was merely a vague, hearsay reference to a supposed article concerning Appellant that one Commission member seemed to recall reading in a Los Angeles magazine in 1981, which, he believed, discussed Appel-

lant's alleged membership policy in accusatory terms. (C.T. p. 884.) The supposed article was never made part of the record. Nor had the issue of discrimination ever once been voiced during the extensive period of staff evaluation. Nonetheless, the Commission adopted the ADL's suggestion and imposed the membership condition before it would issue a permit to Appellant. This was the first instance in California in which the Commission intruded into the internal affairs of an applicant in the permit review process.

Appellant filed a Motion for Peremptory Writ of Administrative Mandamus ("Motion") on September 5, 1985 in the Los Angeles Superior Court, requesting the Commission be ordered to set aside its findings and decision of August 30, 1985. At that proceeding, and thereafter in the courts below, Appellant asserted there lacked a sufficient nexus between Appellant and the State to create "state action" and subject Appellant's membership policy to regulation by the State consistent with the United States Constitution (C.T. pp. 36-42, 176-81, 219-25, 343-47, 376, 382-84; Appellant's Opening Brief, pp. 11-29; Petition for Rehearing, pp. 2-8; Petition for Review, pp. 15-18); that the Commission had deprived Appellant of its right to freedom of association (C.T. pp. 36, 52, 234; Petition for Review, pp. 19-20); and that the Commission's action breached a contract previously entered into by the State. (C.T. pp. 22-25, 206-16; Appellant's Opening Brief, pp. 39-42; Petition for Rehearing, pp. 12-14; Petition for Review, pp. 20-22). In subsequent proceedings, Appellant additionally contended the Commission had deprived Appellant of due process. (Petition for Review, pp. 27-29).

At the hearing on the Motion, the trial court entered judgment for the Commission, finding the Commission had authority under Section 30210 of the Coastal Act to impose the membership condition and also finding, specifically, *there was no evidence before the Court that Appellant discriminated* in its membership practices and policies.

Appellant challenged the trial court's ruling. Appellant's Objections to Proposed Statement of Decision and Request for

Hearing Thereon were denied November 19, 1985. Appellant's Motion For Reconsideration Pursuant to C.C.P. § 1008 also was denied December 24, 1985.

On January 13, 1986, Appellant filed its Notice of Appeal, which appeal resulted in the Court of Appeal's January 14, 1988 Opinion. Appellant's Petition for Rehearing in the Court of Appeal was denied February 3, 1988, and its Petition for Review by the California Supreme Court was denied May 5, 1988.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

I.

THE COURT OF APPEAL'S FINDING OF "STATE ACTION" IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OF A FEDERAL COURT OF APPEALS

The restraints imposed by the Constitution upon the conduct of government may not generally be imposed upon the conduct of private parties. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 172 (1972). This Court's decisions examining the circumstances in which a private organization's associational practices *may* be regulated by a state have followed two different modes of analysis.

First, it has been held that the state may "so far insinuat[e] itself into a position of interdependence with the [private party] that it was a *joint participant* in the enterprise". *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961) (Emphasis added); *Moose Lodge No. 107 v. Irvis, supra,* 407 U.S. at 173. This doctrine has come to be referred to as the "state action" doctrine.

Second, the factual showing in a given case may establish that the private party is, by its very nature, an organization whose activities are sufficiently public and business-oriented that its associational rights constitutionally may be subordinated to the interest of the state in combatting discrimination.

New York State Club Ass'n, Inc. v. New York, 56 U.S.L.W. 4653, 4656 (U.S. June 20, 1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940, 1946-47 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 629-30 (1984).

The Court of Appeal Opinion in the present case purports to find "state action" solely by the former mode of analysis — an interdependence between Appellant and the State. (Opinion, pp. A-6, A-16.) It expressly declines to engage in the latter, as the record contains no evidence of Appellant's size, purpose, policies, selectivity, congeniality or any of the other factors necessary for a decision on this issue under the *Roberts* line of cases cited above. (Opinion, pp. A-16 - A-17.)

A. United States Supreme Court Decisions — the *Moose Lodge/Burton* Analysis

1. *Moose Lodge*

It has been recognized repeatedly that this Court's opinions in *Moose Lodge No. 107 v. Irvis*, *supra*, and *Burton v. Wilmington Parking Authority*, *supra*, exemplify the contrasting poles of the "state action" continuum. On facts strikingly similar to those alleged in the present action, the Court in *Moose Lodge* concluded that no state action was created by issuing a liquor license to a private club.

The plaintiff in *Moose Lodge*, who was a guest of a member of the club in question, was refused food and beverage service because he was Black. Plaintiff brought suit under Section 7 of the Civil Rights Act of 1871. Plaintiff claimed that a *state license* to serve liquor constituted sufficient entanglement with the club for the club's actions to be considered state action, thus bringing the club's policies within control of the equal protection clause of the Fourteenth Amendment.

In the first and primary portion of the state action holding in *Moose Lodge*, Justice Rehnquist rejected the plaintiff's contention, opining that, unlike *Burton, supra,* the facts in *Moose Lodge* exhibited no "symbiotic relationship" beneficial to both the private party and the state:

> "Here there is *nothing approaching the symbiotic relationship* between lessor and lessee *that was present in Burton* .... Unlike Burton, *the Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large.* Nor is it located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the State. In short, while Eagle was a public restaurant in a public building, *Moose Lodge is a private social club in a private building.*"

407 U.S. at 174 (Emphasis added).

Thus, for over sixteen years it has been the law that no state action is created merely by issuing a permit to a private club, such as the liquor license in *Moose Lodge* or the coastal development permit in this case.

The second portion of the state action holding in *Moose Lodge,* termed an "exception" by the Court (407 U.S. at 177), was embraced in the present Court of Appeal Opinion, although it is clearly distinguishable. That portion held, as the Court of Appeal paraphrased:

> "[T]he bylaws having been changed to racially restrict guests, *a provision of the liquor regulations,* otherwise neutral in its terms, *which required adherence to a licensee's constitution and bylaws* invoked the sanctions of the state to enforce a concededly discriminatory private rule."

(Opinion, pp. A-10 - A-11, Emphasis added.)

As the Court of Appeal recognized, it was the specific provision of liquor control regulations which *required adherence* to a licensee's constitution and bylaws (a provision endemic to such regulations) that created state action in *Moose Lodge.* This was so because the provision *implied state enforcement* of the licensee's constitution and bylaws. In the present case, the type of "license" being sought is not one which contains a provision requiring adherence to any constitution or

bylaw. A Coastal Commission permit for Appellant's project would contain no such provision, or even tacit endorsement of Appellant's membership policies. Accordingly, the facts of this case do not "fall somewhere between those of *Burton* and *Moose Lodge*" (Opinion, p. A-13); they fall squarely within the first portion of the state action holding in *Moose Lodge*, inasmuch as there could be no conceivable directive in a Commission permit to adhere to any particular policy of Appellant.

2. *Burton*

In *Burton v. Wilmington Parking Authority, supra*, 365 U.S. 715, a privately-owned restaurant leased space within a publicly-owned parking facility. The restaurant refused service to plaintiff because he was Black, and plaintiff brought suit claiming that such refusal violated his rights under the equal protection clause of the Fourteenth Amendment. The Court found state involvement sufficient to constitute state action.

The crucial issue in determining entanglement in *Burton* was not the lease itself, but the "symbiotic relationship" between the restaurant and state. This was evidenced by a *series* of factors, set forth by the Court, which tied public and private sectors together, *inter alia*, in appearance, financing, upkeep and tax benefits. The language of the *Burton* Court is quite specific:

> "[W]hat we hold today is that when a state leases public property *in the manner and for the purpose shown* to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee . . ."

365 U.S. at 726 (Emphasis added).

The present action, by contrast, involves neither a lease of State-owned property for any manner or purpose relevant to the proposed permit, nor the additional factors found necessary for state action in *Burton*. It is critical to note that the beach property occupied by Appellant is comprised of different parcels. Some are owned by the State and leased by Appellant; others are *owned in fee* by Appellant. The Court of Appeal

erroneously proceeds as if the proposed improvement, which the Commission was to evaluate in 1985, involved *both* privately-held property and leased public property.

In reality, this was not the case. State approval of all proposed modifications to the *leased State property* had already been obtained in the 1984 settlement agreement. (C.T. pp. 448-49.) The only improvement the Commission was evaluating in 1985 was the structural renovation *on Appellant's fee property.* (C.T. pp. 561, 565.) That renovation did *not* encompass a modification of any State-owned property. Thus it was clearly improper for the courts below to find state action.

B. Federal Court of Appeals Case — *Golden v. Biscayne Bay Yacht Club*

The Court of Appeal Opinion in this case is directly contradictory to the Fifth Circuit Court of Appeals holding on truly *indistinguishable facts* in *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 872 (1976). In *Golden*, a private yacht club had used certain property for a number of years when, in 1962, the City of Miami asserted title to the property. The City and club settled the dispute by agreeing the club would *lease from the City* the property in question, which consisted of "bay bottom" lands on which the club's dock facilities were built.

The District Court found the club's membership policy violative of the Fourteenth Amendment and ordered the club "to cease the barring of membership to applicants solely on account of their race and religious affiliations." 530 F.2d 17. As in the present case, the factor which the District Court found created state action was the club's lease of the property from the City. Thus,

> "*A fortiori*, the issue on this appeal is *whether the lease, the sole nexus between city and club, supplied the significant state involvement* required to activate 42 U.S.C. § 1983."

530 F.2d at 18 (Emphasis added).

The Fifth Circuit Court of Appeals, sitting *en banc*, reversed the District Court, stating:

> "On the law as above discussed, and on the facts as above recited, *we have the same opinion of this case that the Supreme Court had in Moose Lodge, supra*; the facts and circumstances fall *far short of the symbiotic relationship found in Burton, supra*. As a matter of law and fact, they *fall short of establishing that the City of Miami has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club*. The City of Miami has *not significantly involved itself in those membership policies. The lease does not provide a sufficiently close nexus between the city and the club* so that the action of the club may be fairly treated as that of the city."

530 F.2d at 22 (Emphasis added).

The present Court of Appeal Opinion is obviously at odds with *Golden*, creating the clearest of needs for this Court to clarify the law. Federal law, under this Fifth Circuit case, specifies that, "the lease *does not* provide a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city," while California law, as a result of the instant case, provides that, "in the case before the court, there is in part the question of the use of property, the fee title of which is owned by the state, leased by the Jonathan Club . . . . Under these circumstances, the use of the property *does* involve state action, and the Fourteenth Amendment does apply." (530 F.2d at 22; Opinion, p. A-14, Emphasis added)

II.

THE COURT OF APPEAL'S RULING PERMITS THE STATE OF CALIFORNIA TO DEPRIVE APPELLANT OF PROCEDURAL DUE PROCESS OF LAW

A. There Has Been No Showing, At Any Point In The Proceedings Below, That Appellant Discriminates

Among the hallmarks of our constitutional system of jurisprudence is the principle that citizens may not be deprived of their property rights without due process of law. U.S. Const.

amend. V; amend. XIV, § 1. One of the foundations of procedural due process is a hearing on the relevant issue. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976).

The truly striking aspect of the present case is that both the trial and appellate courts unabashedly *concede* the lack of any showing or hearing regarding discrimination. (Opinion, p. A-17; C.T. p. 316; *and see* C.T. pp. 557-77, the 22-page report prepared by the Commission's staff regarding the factual information the Commission should consider in the application process, in which *there is no reference to discrimination.*) No grievance was filed by any person in regard to the permit proceeding. No rejected applicant or individual who knows anything about Appellant's membership practices asked the Commission to make those practices an issue in the permit process, and when the Commission did so, it relied upon a nonexistent "evidentiary" showing — an unsupported "general perception of the public."

The cavalier manner in which due process has been treated in this case is illustrated dramatically by the Court of Appeal's statement on page A-17 of its Opinion that:

> "Unfortunately, *the record here does not contain sufficient details about The Jonathan Club to afford us the opportunity* to engage in that kind of analysis [regarding alleged discriminatory policies]. *All the Commission knew about the Club* was that it . . . *was reputed to practice discriminatory membership policies*, and refused to discuss the issue. We have approached the case on that basis." (Emphasis added).

The troublesome thing about the Court of Appeal's Opinion is not that the quoted provision is a misstatement of fact. It is not. The troublesome thing is that the court *admits* to having no evidence, just a "repute", of discriminatory practices, yet it reaches a conclusion for which a finding of such practices should be a prerequisite. The Court of Appeal's ruling literally permits an administrative agency, with no proof whatsoever, to impose any condition it sees fit on a private party, based upon a parade of qualifying language such as a "possibility" (Opinion,

p. A-23) a foundationless "general perception of the public" (Opinion, p. A-5) or vague, hearsay recollections of a dated magazine article to support that which is "purportedly" (Opinion, p. A-5) or "reputed[ly]" (Opinion, p. A-17) an organization's membership policy. Not since the days of trial by ordeal has such a gossamer evidentiary showing been held to establish a fact necessary to a judicial determination.

B. Procedural Due Process Requires A Showing Of Discrimination Before Appellant May Be Deprived Of Its Property And Liberty Rights

1. The *Mathews v. Eldridge* Analysis

The proper approach to the recurrent question of "what process is due" in administrative and other proceedings was developed by this Court in *Mathews v. Eldridge*, *supra*, 424 U.S. 319:

> "[I]dentification of the specific dictates of due process generally requires *consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation* of such interest through the procedures used, and the probable values, if any, of additional or substitute procedural safeguards; *and finally, the Government's interest*, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

424 U.S. at 334-35 (Emphasis added).

Under this analysis, the proceeding at issue in the present case is unquestionably one in which the rules of evidence should have been applied more strictly. Examining the first *Mathews* factor, the private interest affected by the government action, a substantial right to develop Appellant's private property, is at issue. Appellant has invested a great deal of planning, financial resources, negotiation and energy into the development over a period of several years. (C.T. pp. 10-12, 538-669, 972-1128.) The State opened the door to the development by settling the prior litigation on the terms and condi-

tions provided in the settlement agreement. The State had *no other objection* to the development except for the remaining conditions in the Commission's staff report, which were negotiated at length and resolved in a manner acceptable to both parties. Thus, but for the Commission's attempted imposition of the membership condition, Appellant would be entitled to the permit.

Turning to the second *Mathews* factor, the risk of an erroneous deprivation through the procedures used in the present case is immense. If the Commission is incorrect in its determination that an applicant discriminates, or if the Commission is incorrect in its tacit determination that an applicant is the type of actor by whom discrimination may constitutionally be prohibited, the ruling will be erroneous. What procedures does the Commission use to ensure that these sensitive determinations will be accurate? The answer, unhappily, is "none whatsoever". The Commission admittedly based its ruling solely upon speculation and innuendo. The "value of additional or substitute procedural safeguards" under *Mathews* is patently obvious in this case — substituting "something" for "nothing" in terms of procedure will assist in probing the issue at hand.

Examining the final *Mathews* factor, the government interest involved does not outweigh the procedural curtailments which the Commission seeks to impose. Fighting prohibited types of discrimination is an important government purpose; however, that purpose is diluted in impact where, as here, the proceeding at issue is not the least restrictive, most direct or well-suited to effectuate that purpose. There exist numerous other, more direct ways to effectuate the goal of preventing discrimination, such as the federal civil rights statutes and the "Unruh Civil Rights Act" in California (California Civil Code Section 51, *et. seq.*). By contrast, the goal of combatting discrimination is, in the context of the Commission permit process, a misfitting, tangential issue to the true goal of *this* procedural mechanism, the orderly and ecologically sound maintenance of California's coastline. In sum, the governmental interest sought to be advanced in *this* case, by *this* mechanism, falls far short of

outweighing the evils of an oppressively curtailed procedure which could be remedied by the simple expedient of hearing evidence on the relevant issue.

2. The Court of Appeal Opinion Conflicts With Federal Law

While examples of reported decisions finding that procedural curtailments of the type at issue here violate due process are exceedingly numerous, three brief citations will suffice for purposes of the present Statement. First, in *Speiser v. Randall*, 357 U.S. 513 (1958), the State of California required World War II veterans to sign a declaration stating they did not advocate the violent overthrow of the government before they could receive a special property tax exemption for veterans, to which they were otherwise entitled. The state taxing agency was given the power, without any requirement that it base its conclusions upon competent evidence, or any evidence at all, to "second-guess" the declaration and determine that a taxpayer was ineligible for the exemption even if he had signed the declaration.

The Court held that due process was violated by the State allocating the burden of proof to the taxpayer and granting itself the power to reject the declaration based upon no information or incompetent information, thus, "*appellants were not obliged to take the first step in such a procedure.*" 357 U.S. at 529 (Emphasis added).

A similar, overzealous attempt to stamp out an unpopular practice was held to violate due process in *National Council of American-Soviet Friendship, Inc. v. Subversive Activities Control Bd.*, 322 F.2d 375 (D.C. Cir. 1963). In *National Council*, a federal administrative agency, the Subversive Activities Control Board, determined the plaintiff organization was substantially directed, dominated or controlled by the Communist Party, thus that it qualified as a "Communist front" under the Internal Security Act of 1950 and would be required to register as such. The Board's ruling was based upon extensive, but hearsay, evidence that the organization's controlling persons *were reputed to be* Communists. This attempted proof of the

character of the organization's membership by hearsay and speculation was held to violate procedural due process:

> "Much of this *evidence was hearsay*, which, in view of the nature of the ultimate determination the Board was bound to make, *we cannot accept as adequate proof . . . . Hearsay may acquire adequate weight when it is buttressed with other evidence, or reflects common knowledge, or its character as hearsay is a pure technicality, or the fact to which it relates is relatively insignificant or minor. But at other times hearsay involves circumstances* and considerations the impact of which will *turn upon the governmental function* to be executed, *what, if any, restrictions or punishment may follow, whether the rights are public and general or purely personal* and similar incidents. . . . *The fact here sought to be proved was specific — the membership of a named individual in a named organization.* Even though that be deemed to be a subjective fact, it must be proved by objective criteria and circumstances. Those circumstances were *known to some, possibly many, persons.* The purported informer was named. There was *no necessity for the acceptance of the hearsay route. No probability of trustworthiness* clung about the statement . . . .
>
> *The imagination runs riot if we contemplate the results of a ruling that, if a highly placed member or officer of some organization says so-and-so is a member of that entity, such a statement relayed to the witness stand by a third person, without more, is acceptable proof* of the fact of membership."

322 F.2d at 386-87 (Emphasis added).

Finally, in *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980), the federal government rejected the plaintiff's bid to supply products to military bases. The rejection was based upon the government's determination, from an audit it had performed, that there were "irregularities" surrounding plaintiff's prior government contracts such that plaintiff "lacked integrity." Based upon the fact that the plaintiff was given no notice that its "integrity" would be an

issue in the bid process, just as Appellant here was given no notice that its membership practices would become an issue in the permit process, the court found that a violation of due process had occurred. 631 F.2d at 964.

III.

THE COURT OF APPEAL OPINION DEPRIVES APPELLANT OF ITS RIGHT TO FREEDOM OF ASSOCIATION AND RELATED RIGHTS

A. Private Parties Have The Right To Freedom Of Association

This Court, with increasing frequency, has recognized that private parties have a right to freedom of association. The right arises from the First Amendment, made applicable to the states by the Fourteenth Amendment. *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958); *see also Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 91 (1982); *Healy v. James,* 408 U.S. 169, 181 (1972); *Baird v. Arizona,* 401 U.S. 1, 6 (1971); *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965); *Gibson v. Florida Legislative Comm.,* 372 U.S. 539, 543-44 (1963); *Bates v. Little Rock,* 361 U.S. 516, 523 (1960). The right is not confined to organizations propounding a political "message", but extends to any field of human endeavor, including social activity. *Thomas v. Collins,* 323 U.S. 516, 531 (1945). The right requires that individuals be as free to associate to pursue lawful aims as they would be if the same individuals pursued the same aims separately. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 296 (1981).

Applied to the present situation, the right guarantees that a state may not constitutionally dictate with whom private parties will associate. As Justice Douglas stated with candor in *Moose Lodge, supra*:

> "[T]he First Amendment and the related guarantees of the Bill of Rights — *create a zone of privacy which precludes government from interfering with private clubs or groups.* The *associational rights* which our system honors *permit all white, all black, all brown, and all yellow clubs* to

> be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. *Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.*"

Moose Lodge No. 107 v. Irvis, supra, 407 U.S. at 179-80 (Douglas, J., dissenting); *see also Democratic Party of the United States v. Wisconsin,* 450 U.S. 107 (1981), in which the Court noted:

> "*Freedom of association would prove an empty guarantee if associations could not limit control* over their decisions to *those who share the interests and persuasions that underlie the association's being.*"

450 U.S. at 122 n. 22 (Emphasis added); *see also Healy v. James, supra,* 408 U.S. at 181; *Korzenik v. Marrow,* 401 F. Supp. 77, 84-85 (S.D.N.Y. 1975). More recent decisions identify that the right has two prongs, a right of intimate association and a right of expressive association. *Roberts v. United States Jaycees, supra,* 468 U.S. at 618; *Board of Directors of Rotary International v. Rotary Club of Duarte, supra,* 107 S.Ct. at 1945.

Appellant has a related right to privacy, recognized as originating in the First, Fourth and Fifth Amendments and their "penumbras" and "emanations" in *Griswold v. Connecticut, supra,* 381 U.S. at 484-85. In the present case, this right protects Appellant from microscopic scrutiny of its membership and government intrusion into personal associational rights. A second related right is that of substantive due process, which, while rarely used for review of government action in the *economic* sphere since the 1930s, continues to afford citizens protection against legislation that has no reasonable relation to a legitimate end of government in the *social* sphere, especially where fundamental rights are involved. *Moore v. East Cleveland,* 431 U.S. 494, 502-03 (1977); *Griswold v. Connecticut, supra,* 381 U.S. at 481, 493, 500 (majority opinion, Goldberg, J., concurring and Harlan, J., concurring); *United States v. Carolene Products Co.,* 304 U.S. 144, 152-53 n. 4 (1938); *accord Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 401 (1923).

Government acts which interfere with associational rights are subject to "strict scrutiny" review because of the fundamental nature of the rights involved. *NAACP v. Alabama*, *supra*, 357 U.S. at 460-61.

B. There Is No Showing, By Factors Such As Those Identified Under The *Roberts* Line Of Cases, That Appellant's Associational Rights Are Any Less Than Those Of A Private Individual

Since Appellant is a private club, the Commission may be expected to raise (and attempted to raise below) an argument which the Court of Appeal declined to rule upon, based upon Appellant's freedom of association rights (or alleged lack thereof) and the *Roberts* line of cases. The very fact that the court below lacked any record sufficient to make a determination on these issues illustrates the infirmity of the procedure used by the Commission to make pronouncements itself which determine these issues *sub silentio*. In addition to lacking an evidentiary showing that Appellant has a discriminatory membership policy or discriminates, the proceeding below also lacked any evidentiary showing that Appellant was a sufficiently "public" organization as to render its rights to freedom of association less than those of a private individual.

Like any other constitutional right with a potentially applicable exception, Appellant is presumed to have an unhindered right to freedom of association until the government shows the existence of factors which render Appellant subject to the exception; it is *not* presumed to be subject to the exception until it can prove the contrary. *Healy v. James*, *supra*, 408 U.S. at 186; *Speiser v. Randall*, *supra*, 357 U.S. at 526; *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972).

In *Bursey*, *supra*, the court stated:

> "The Government's argument takes as its premise the conclusion to be proved: The expressions and associational relationships in issue are not protected by the First Amendment. This argument *implies that there is a presumption of non-protection* applied to the expressions and associations involved in this case *and that the witnesses are*

> *obliged to overcome it* before they can rely on the First Amendment. *The Government has it backwards. All speech, press, and associational relationships are presumptively protected* by the First Amendment; the *burden rests on the Government to establish that the particular expressions or relationships are outside its reach.*"

466 F.2d at 1082 (Emphasis added); *see also Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970).

As the Court of Appeal recognized, the record in this case "does not afford us the opportunity to engage in that kind of analysis" in view of this Court's recent rulings. In *Roberts* and *Rotary*, the Court had the benefit of trials below, pursuant to specific anti-discrimination statutes, which resulted in definitive evidence as to the factors the Court found necessary to render the organizations "public" in nature and make regulation of their membership practices constitutionally proper. In both cases, the record indicated the purpose of the organization, the nature of its activities, the number of its members, the manner in which members were selected and a showing that discrimination existed. 468 U.S. at 612-17; 107 S.Ct. at 1942-44. In *New York State Club Association*, the record reflected a statute containing specific requirements as to these factors — requirements that the organizations reached by the statute have 400 members, regular meal service and receipts from nonmembers for business purposes. The New York City Council had taken testimony and issued findings identifying the problem it sought to remedy, the constitutional issues involved and the reasons for exempting certain benevolent organizations from the scope of the statute. 56 U.S.L.W. at 4655. Noting that an individual association could challenge the ordinance as applied to it, the Court held that it was not unconstitutional *on its face. Id.* at 4657.

This approach was not followed in the present case. In contrast to *Roberts*, *Rotary* and *New York State Club Association*, there is no showing here that Appellant is subject to any limitation upon its associational rights. The Commission has failed to make any evidence regarding Appellant's "public" or

"business-related" character a part of the record in this case. As the Court of Appeal stated, "[a]ll the Commission knew about the Club was that it owned and operated a facility at Santa Monica State Beach, proposed a development which included a sizeable block of leased state land [as discussed above, this assertion is incorrect], was reputed to practice discriminatory membership policies, and refused to discuss the issue." The burden of establishing that Appellant is, in constitutional terms, anything other than a private party is not met, and there can be no *sub silentio* limitation upon Appellant's associational rights.

C. Applying The California Coastal Act To Create A Basis For The State's Act In The Present Case Unconstitutionally Infringes Upon Appellant's Associational Rights

1. The Membership Condition Interferes with Appellant's Associational Rights

The lower courts' effort to interpret the Coastal Act as giving an unqualified state agency the unbridled power to dictate Appellant's membership policies must fall as unconstitutional, especially under the strict scrutiny standard mandated by *NAACP v. Alabama, supra,* 357 U.S. at 460-61. As the first step in the analysis, it is obvious that the condition inhibits Appellant's associational rights. Indeed, the condition attempts to force Appellant to allow the State to control Appellant's membership policy. *See Roberts v. United States Jaycees, supra,* 468 U.S. at 623. The analysis then turns, under a strict scrutiny analysis, to the question whether the means used are necessary to accomplish the end. *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Shelton v. Tucker,* 364 U.S. 479, 490 (1960).

2. The Means Used by the State Are Not Necessary to Accomplish the End Sought; There Are Less Restrictive Alternatives

(i) Existing Statutes Provide Remedies

Where First Amendment rights, such as the freedom of association, are implicated, the State bears a heavy burden of

demonstrating that the governmental interest is compelling, that the means are necessary and that the imposition upon First Amendment rights is no more than is essential to accomplish the governmental interest. *Roberts v. United States Jaycees, supra,* 468 U.S. at 623; *NAACP v. Alabama, supra,* 357 U.S. at 463; *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 509 (1969).

The means at issue in the present case are not *necessary* to accomplish the end of satisfying the governmental interest. As discussed above, numerous "direct" remedies for the types of discrimination which are prohibited by law already exist, including the federal civil rights statutes and the Unruh Civil Rights Act in California. Anyone who can show that Appellant is subject to the anti-discrimination provisions of these statutes and, in fact, has discriminated in a way prohibited by them may seek redress. To the extent that a party cannot recover through these statutes, an alternative Commission remedy should not be available, since the conduct for which remedy is sought either did not occur or is not redressable within the parameters of the constitutional and statutory provisions designed for that purpose.

Both the aforementioned state and federal statutes have been in existence for some time and enjoy established, predictable standards for their application, by which the parties to a dispute may govern themselves. By contrast, Commission pronouncements of the type at issue are promulgated by fiat, follow no existing rules or standards, demonstrably do not require any evidentiary showing of discrimination and are redundant to the extent they are proper at all.

(ii) The Means Entrust Sensitive Determinations on Complex Constitutional Issues to an Unqualified State Agency

The means chosen by the State to combat discrimination in the present case are also ill-suited to the task because they entrust determinations of sensitive constitutional issues, involving fundamental rights, to an unqualified agency. As the court in *Downen v. Warner*, 481 F.2d 642 (9th Cir. 1973),

remarked regarding administrative agencies and constitutional issues generally:

> "Resolving a *claim founded solely upon a constitutional right* is singularly *suited to a judicial forum* and clearly *inappropriate to an administrative board.*"

481 F.2d at 643 (Emphasis added.)

Looking more particularly at the present case, there is absolutely nothing in the Coastal Act which suggests that training or facility in constitutional law are required, or even considered, as factors qualifying one to be a Coastal Commissioner. (California Public Resources Code, Section 30301, *et seq.*) Indeed, the Commission engaged in no analysis whatsoever of the constitutional issues involved in this case, and some Commissioners noted the inappropriateness of entrusting adjudications on such issues to the Commission in this very proceeding. (C.T., p. 911).

The fundamental rights involved in this case should not be entrusted to an administrative agency with no guidelines set forth by statute, least of all to an agency whose members' expertise does not include anything resembling constitutional law. Again, in contrast to *Roberts*, *Rotary* and *New York State Club Association*, *supra*, the State statute, even as interpreted by California's courts, provides absolutely no guidelines as to the conditions which must be met in order for an applicant's associational rights to be subject to control by the Commission. As such, the statute is void for vagueness, if for no other reason. The Court dealt with a void-for-vagueness challenge in *Roberts*, articulating a standard which was met in *Roberts* but clearly not met in the present case:

> "In deciding that the Act reaches the Jaycees, *the Minnesota Supreme Court used a number of specific and objective criteria* — regarding the organization's *size, selectivity, commercial nature, and use of public facilities — typically employed in determining the applicability of state and federal anti-discrimination statutes to the membership policies of assertedly private clubs.* [Citations omitted.] The Court of Appeals seemingly acknowledged that

> the Minnesota court's construction of the Act by *use of these familiar standards ensures that the reach of the statute is readily ascertainable . . . .*"

468 U.S. at 629-30 (Emphasis added).

Here, neither the state legislature, the Commission or California's courts at any level have taken the opportunity to set forth guidelines of the type found sufficient in *Roberts*, or any type at all. The Court of Appeal ruling opens the door for the Commission to require a two-person children's "club," or even a private homeowner, to admit persons of all races, genders and religions to his home, which is clearly unconstitutional. Such unbridled authority is simply not condoned under our constitutional system of governance.

(iii) The Route of Statutory Interpretation Used by the California Courts Illustrates the Lack of Any Nexus Between the Commission's Qualifications and the Issues it Now is Allowed to Determine

The fact that the utilization of the Commission permit process is not strictly necessary, or even reasonably related, to the end sought to be achieved is best illustrated by the tortured route of statutory interpretation the California courts have followed, after-the-fact, to justify Commission intervention in this area. Those courts found support for the Commission's authority to impose the membership condition in constitutional and statutory provisions providing that, "access to the navigable waters of this State shall always be attainable for the people thereof." (California Constitution art. X, § 4; California Public Resources Code, Section 30001.5, subdivision (c) and Section 30210.) (Opinion, pp. A-18 - A-19.)

The key word in the quoted phrase is obviously "access." As is the case with any private landowner, Appellant may clearly restrict "access" to its private property, as a gateway to the beach, to invitees. The real issue, and the only ground for the Commission's involvement, is whether the general public has sufficient beach access *around* Appellant's property. This type of access exists. As the record indicates, the public in this case is "excluded" only as it would be excluded from walking

through a private home to gain access to the beach. Physical access to the beach clearly exists by the simple expedient of walking through the existing public walkway and the proposed vertical accessway. (C.T. p. 451, 570.) The true right of access by the public is maintained; it is only a right of trespass which is not maintained.

The Court of Appeal Opinion, in purporting to find such authority grounded upon the "access" provisions of the enabling statutes, is in conflict with *Nollan v. California Coastal Commission*, 107 S.Ct. 3141, 3149 (1987), in which this Court was forced to invalidate yet another overreaching condition sought to be imposed upon a development permit by the same state agency, and that was upheld by the same district of the California Court of Appeal, as those now before the Court. In *Nollan*, the Court invalidated a condition, imposed by the Commission in granting a permit, that the applicants allow the public an easement to cross over their beach, because the easement had no reasonable nexus to the purpose of the permit, even considering the "access" provisions of these same statutes.

Here, the lack of nexus between the condition (controlling Appellant's membership) and the end underlying the Commission's prohibition power (protecting the natural resources of the beach) is even more apparent than in *Nollan*. As such, it is even more constitutionally infirm. The notion that access to the beach by the public is endangered unless the Commission ensures that *representative members* of every type of group comprising the public are eligible to become invitees of a private landowner is patently unsupportable under *Nollan*. The argument is hopelessly circular, because the Court of Appeal seeks to parlay a coincidental, different meaning of the word "access" — a meaning synonymous with "eligibility for membership" — into an expansion of the Commission's authority based upon the meaning of "access" as used in the statute — a meaning synonymous with "physical reachability."

Moreover, if the Commission is correct that the term "access," as used in the statute, can justify a government require-

ment that Appellant grant all members of the public "access" to its private property through eligibility for membership, the statute as applied is unconstitutional for another reason. The requirement that a private landowner provide public access across its property in this situation is a taking without just compensation under the Fifth Amendment "taking clause" as interpreted in *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

IV.

THE COURT OF APPEAL'S RULING PERMITS THE STATE OF CALIFORNIA TO VIOLATE THE "CONTRACT CLAUSE"

The "Contract Clause" of the Constitution provides that no state may "pass any . . . law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. In addition to limiting the power of states to regulate contracts between private parties, the clause has long been held to limit the power of states to modify their *own* contracts. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 643-44 (1819).

As stated in *United States Trust Co. v. New Jersey, supra*:

> "[T]he *Contract Clause limits otherwise legitimate exercises of state legislative authority*, and the *existence of an important public interest is not always sufficient to overcome* that limitation.
>
> • • •
>
> *[W]ithout modifying the covenant at all, the States could have adopted alternative means* of achieving their twin goals of discouraging automobile use and improving mass transit. Appellees contend, however, that choosing among these alternatives is a matter for legislative discretion. But *a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic*

> *impairment when an evident and more moderate course would serve its purposes equally well."*

431 U.S. 21, 30-31 (Emphasis added).

The Court noted that this result was especially appropriate given the fact that the concerns which led to the attempted modification of the contract in *United States Trust Co.* were known to the states when the contract was formed:

> *"But these concerns were not unknown in 1962,* and the subsequent changes were of degree and not of kind. *We cannot say that these changes caused the covenant to have a substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in the light of changed circumstances."*

431 U.S. 31-32 (Emphasis added).

From a constitutional standpoint, the situation in the present case is exactly the same as that in *United States Trust Co.* The State entered into a contract with Appellant in 1984. That contract settled the dispute and conveyed the State's approval of the only development impacting upon the leased State property, based upon the conditions of that contract.

Only one year later, the State sought to abrogate the contractual provision and to inject a new, inconsistent provision because an additional social objective had been suggested to it. (See *Statement of the Case,* above). This was a clear impairment of the contract provision by which the State "signed off" on Appellant's development plans, insofar as they affected State lands, based upon the conditions provided in the 1984 contract. As in *United States Trust Co.,* the State was not free to consider impairing the obligations of its own contracts "on a par" with other alternatives to effect its newly-contemplated social objective. As in *United States Trust Co.*, the societal setting in which the contract was entered into in this case had not changed by the time the modification was attempted. The same "general perception of the public" (Opinion, p. A-5), which the Court of Appeal apparently found sufficient to form a basis for the

Commission's acts in 1985, would have been equally present in 1984.

No contracting party should be more stable, dependable or constant than the Sovereign. The Court of Appeal Opinion violates this fundamental principle of law and sends a message to all who might potentially contract with any state that such contracts are anything but certain and may be modified, supplemented or contradicted by a later whim of an unrelated state agency.

CONCLUSION

There are any number of direct legal remedies for the types of discrimination prohibited by law, in which a court may make an informed determination, based upon admissible evidence and not upon speculation. The Commission permit process is simply not intended or equipped to be one of those remedies, nor is there any evidence whatsoever in this case that Appellant's conduct is in need of remedying. The present case itself illustrates the result when such sensitive determinations are entrusted to an unqualified state agency: a ruling has resulted which obliterates the distinction between a state actor and a non-state actor, which violates due process, which violates Appellant's associational, privacy and substantive due process rights and which violates the Contract Clause, none of which even occurred to the Commission to consider.

Appellant is mindful of the compelling nature of the alleged discrimination issue which has been referred to repeatedly in this proceeding. The fact that such issue hovers over this proceeding by innuendo and hearsay (even though it has not been addressed evidentiarily by *either* party) must not be used to trample Appellant's constitutional rights or obscure the application of well-established legal principles which define the extent of those rights. The Court of Appeal Opinion suffers from an overzealous attempt to serve a laudable social goal at the expense of rational appellate exposition of constitutional doctrines. A just cause does not justify contorting the constitu-

tional and statutory law of the United States and its largest State.

It is clear that California and many other states are embarking upon highly-publicized examinations of private club membership policies. Only this Court may set the guidelines for the manner in which that examination will be conducted. Only this Court can determine whether functions as sensitive as balancing the fundamental constitutional issues involved in that inquiry will be permitted to be practiced by any agency, regardless whether its expertise, intended function, training or resources have anything whatsoever to do with the issues involved. Only this Court can determine, even if a particular agency is so empowered, whether that agency need base its findings and remedial acts on anything more solid than a "possibility" or a foundationless "general perception of the public."

Appellant respectfully urges the Court to seize upon the present opportunity to resolve these questions and to note probable jurisdiction of the present appeal.

DATED: August 1, 1988

Respectfully submitted,

BAKER & MCKENZIE
JOHN R. SHINER
JANET A. KOBRIN

Attorneys for Appellant
Jonathan Club

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL FOR THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

No. B018588

(Super. Ct. No. C563602)

JONATHAN CLUB,
Plaintiff And Appellant,

vs.

CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent.

Filed: January 14, 1988 Robert N. Wilson, Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman R. Dowds, Judge. Affirmed.

MacDonald, Halsted & Laybourne, John R. Shiner and Janet A. Kobrin for Plaintiff and Appellant.

John K. Van de Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General, and Anthony M. Summers, Supervising Deputy Attorney General, for Defendant and Respondent.

Betsy R. Rosenthal, Jonathan R. Lightman and David A. Lehrer, Anti-Defamation League of B'nai B'rith, Amicus Curiae on behalf of Defendant and Respondent.

Fredric D. Woocher, Women Lawyers Association of Los Angeles and American Jewish Committee, Amici Curiae on behalf of Defendant and Respondent.

This is an appeal by the Jonathan Club (the Club) from a superior court judgment denying its petition for peremptory writ of administrative mandamus. In the petition, the Club sought to invalidate a membership condition precluding discrimination on the basis of race, sex or religion which was imposed by respondent California Coastal Commission (the Commission) as a requirement for obtaining a development permit.

The Club's primary contentions of error are that (1) the evidence failed to establish the state action which is a prerequisite to imposition of such a condition on a private club; (2) the Commission lacked statutory authority to impose the condition; (3) the Commission was statutorily precluded from imposing the condition due to a boundary line agreement previously entered into as part of a settlement between the Club and the state; and (4) imposition of the condition breached the settlement.

We find no error, and therefore affirm.

In 1974, the State of California (through its Department of parks and recreation and State Lands Commission) and the City of Santa Monica filed an action to quiet title against various property owners along Santa Monica State Beach, the most heavily used public beach in the state. The issue in the litigation was the ownership of the sandy beach which had accreted seaward of the mean high tide line established by a 1921 survey as the boundary between the private property towards the land and the public property towards the sea. One of the defendants was the Club, which owns and operates a facility at the beach.

Following years of complex litigation, the state, city and Club entered into a settlement in 1984 which included a boundary line agreement and conveyances, a permit for improvements and lease option agreement, and a lease agreement with options (hereinafter sometimes referred to collectively as "the lease"). The Club gave up all ownership claim to property seaward of the 1921 boundary line in exchange for exclusive use of four parcels of state-owned land bordering on land owned by the Club. Three of the four parcels are seaward of the 1921 boundary; the fourth is landward of the boundary and immediately south of Club property. The first three parcels are leased for 25 years, and the fourth for 10 years, with options to renew. The Club's annual rent is in excess of $40,000. The public retains use of the tidelands nearest the water, and the Club must construct a clear lateral public accessway along the south boundary.

The lease further provides that the Club's intended use of the leased parcels for parking and paddle tennis courts is to be deemed approved concurrently with the settlement, on condition that the club obtain any necessary permits. There is no mention of any condition regarding the Club's membership policies.

The 1984 settlement was approved by a judgment of the superior court on January 2, 1985.

On January 31, 1985, the Club filed an application with the Commission for a coastal development permit.[1] The proposed development is a major remodeling and expan-

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[1]The City of Santa Monica had already approved the development. Its environmental impact assessment noted that the proposal would result in reduced off-street parking and that the impact of the expansion on existing recreational opportunities could be addressed by the Commission.

sion of the beach facility. It involves 122,000 square feet of land, 58,000 square feet of which is leased public property. The plan includes expanding further seaward onto both leased and fee-owned sandy beach, and incorporating parking spaces from leased public land which previously had been used for parking by both the Club and the public. The four public parcels will be used chiefly for parking and paddle tennis courts.

The lengthy staff report prepared by the Commission recognized that the proposed project would permanently convert existing sandy beach to nonsandy beach use and benefit the Club's membership while inhibiting or preventing the general public from enjoying a publicly owned area of the beach. To incorporate public benefits which would mitigate the project's adverse effect on the public, 10 conditions were recommended. Among the conditions were elimination of the paddle tennis court which extended furthest seaward, restoration of a degraded public beach area adjacent to the project, continuation of a parking shuttle, and payment of a sizeable fee for shoreline enhancement purposes. There was again no condition involving the Club's membership.

At the July 25, 1985 public hearing of the Commission, the Commission's staff analyst pointed out that granting the Club exclusive use of the parcels for development "would push the public and [the Club's] beach users, further seaward onto a public beach" which was not stabilized due to storm damage. Approval of the permit was still recommended, subject to the conditions which were the result of months of negotiations with the Club. The local property owner's association supported issuance of the permit. However, a representative of the Anti-Defamation League of the B'nai B'rith, appearing on

behalf of numerous minority organizations,[2] then argued that an additional condition should be imposed. He maintained that it was the general perception of the public that minorities were excluded from Club membership, and that since the proposed development included public land, the Commission should condition approval upon an affirmative declaration from the Club that it utilized nondiscriminatory admission policies.

One committee member discussed a 1981 magazine article he had read which purportedly contained descriptions by Club members of invidious discrimination in Club membership policies, including the Club's failure to grant Los Angeles' black mayor a traditional honorary membership.

When queried, representatives of the Club repeatedly refused to state whether or not the Club had discriminatory membership policies, on the ground that issue was not before the Commission.

A deputy attorney general advised the Commission that the use of state land in the project appeared to constitute sufficient state action to permit imposition of such a condition. The Commission staff indicated it also had been concerned about the possible exclusion of minorities, but that since it was not clear whether the Coastal Act authorized such a condition, the decision had been left up to the Commission.

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[2]Including local or regional offices of the Anti-Defamation League, American Jewish Committee, Asian-Pacific American Legal Center, Jewish Federation Council, National Association for the Advancement of Colored People, National Organization for Women, Mexican-American Legal Defense and Education Fund, The Urban League, and the American Jewish Congress.

After lengthy debate, a majority of the Commission members voted to add a nondiscrimination condition. The finding was adopted and the Club's motion for reconsideration was denied at a subsequent Commission hearing on August 30, 1985.

The condition which was adopted states: "Prior to transmittal of a permit, the Jonathan Club shall deliver to the Executive Director a statement that the Club will not discriminate on the basis of race, sex or religion. The certification of membership policy shall remain in effect during the life of this project."[3]

On September 5, 1985, the Club filed a petition for peremptory writ of administrative mandamus in an effort to set aside the membership condition.

After reading the administrative record and hearing detailed argument, the trial court denied the petition. In its statement of decision, the court found state action because the Club was exclusively using state-owned leased property which was immediately adjacent both to property owned by the Club and to the most heavily used public beach in the state. It further found that the state had not waived any right to enforce the Fourteenth Amendment through the 1984 settlement; that the Commission had authority to impose a nondiscrimination condition pursuant to its statutory mandate to provide maximum access for all people; that, although there was no evidence that the Club actually discriminated, it was

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[3]The Club complains that the wording of the condition in the findings adopted on August 30, 1985, is slightly different and more difficult to meet than the language in the proposed findings which had been circulated prior to the meeting. The club has no valid cause for complaint. The wording was properly changed at the August hearing to more accurately reflect the transcript of the July hearing at which the actual motion of the Commission was passed.

reasonable to impose a condition of nondiscrimination in light of the Club's refusal to assure the Commission that it did not discriminate; that a statute excluding boundary settlements from the jurisdiction of the Commission was inapplicable; and that the findings of the Commission were supported by substantial evidence.

The Club's motion for new trial was denied, and this appeal followed.

I

The Club's primary argument is that the use of leased state lands in the proposed development constitutes insufficient entanglement with the state to justify a finding of state action.

The parties agree on the controlling case law but disagree on the application of those cases to these facts.

In *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, the defendant was a privately-owned restaurant which leased space in an automobile parking building which was owned and operated by a state agency. When the restaurant refused to serve a black man, he sued for declaratory relief on the ground of infringement of his rights under the equal protection clause of the Fourteenth Amendment. The Supreme Court held the circumstances showed discriminatory state action which violated the equal protection clause.

The *Burton* court's analysis began with the well-settled principle that the equal protection clause prohibits discriminatory action by the state and not private conduct. (365 U.S. at pp. 721-722.) "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become

involved in it . . ." (*Id.* at p. 722.) There is no precise formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." (*Ibid.*).

In evaluating the facts, the court recognized that the cost of the facility was only partly advanced from public funds; there was a sizeable proportion of commercial leasing in the structure which would produce more annual revenue than did parking; it was only by chance that the leasing included a restaurant; the restaurant had expended considerable money on furnishings; the restaurant's main entrance was from the street and not the parking area; and the only connection between the restaurant and the parking facility was its furnishing of $28,700 in annual rent. (*Id.* at p. 723.)

On the other hand, the land and building were publicly owned and dedicated to public use; public funds would be used for the costs of land acquisition, construction, maintenance and repairs; the leased area was not surplus state property but an indispensable part of the state' s plan for the project; the restaurant could not be taxed on improvements to the leasehold; and the location of the restaurant within the parking facility conferred various mutual benefits, such as affording convenient parking for restaurant users and a convenient dining place for users of the parking facilities. (*Id.* at p. 723-724.)

"Addition of all these activites, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amend-

ment to condemn." (*Id.* at p. 724.) The state had "so far insinuated itself into a position of interdependence" with the restaurant that it had become " a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." (*Id.*, at p. 725.)

Burton saw no problem with the fact the parking facility had not imposed a requirement in the lease that restaurant services be made available to the general public on a nondiscriminatory basis. "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.... By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (*Id.* at p. 725.)

Burton cautioned that the determination of state action could not be deduced solely from a lease and must be based on the facts of each case. Its specific and limited holding was "that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." (*Id.* at p. 726.)

In *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, a white member of the defendant, a private club, brought a black man there as his guest. The guest was refused service solely because of his race. He brought an action against the club under the Civil Rights Act of 1871, on the theory that the refusal of service constituted "state action" for purposes of the Fourteenth Amendment because

the State Liquor Control Board had issued a liquor license to the club. The opinion by Justice Rehnquist found that the operation of the regulatory scheme enforced by the Liquor Control Board did not sufficiently implicate the state in the discriminatory policies of the lodge to make that operation "state action" within the ambit of the equal protection clause of the Fourteenth Amendment. (*Id.* at p. 177.)

The evidence in *Moose Lodge* showed that each local lodge was bound by general bylaws which limited membership to white male Caucasians, and maintained a policy of permitting only white guests on lodge premises. The club conducted all its activities in a building it owned, received no public funding, and permitted only members and invited guests inside. While the case was on appeal, the bylaws were changed so that the official racial restriction which formerly applied only to members also applied to guests.

Justice Rehnquist's opinion recognized "the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.' " (*Moose Lodge No. 107 v. Irvis, supra,* 407 U.S. at p. 172, quoting *Shelley v. Kraemer* (1948) 334 U.S. 1, 13.) The court went on to find that, unlike *Burton,* there was no symbiotic relationship between the club and the state. While *Burton* involved "a public restaurant in a public building," *Moose Lodge* involved "a private social club in a private building." (*Moose Lodge, supra,* at p.175.) The opinion concluded, however, that the bylaws having been changed to racially restrict guests, a provision of the liquor regulations, otherwise neutral in its terms, which required adherence to a licensee's constitution and bylaws invoked

the sanctions of the state to enforce a concededly discriminatory private rule. "State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action. (*Robinson v. Florida,* 378 U.S. 153, 156 (1964)." (*Moose Lodge, supra,* at p. 179.) Enforcement of that provision of the regulations was therefore enjoined.

In *Gilmore v. City of Montgomery* (1974) 417 U.S. 556, the court upheld an injunction prohibiting the city from exclusively allocating its recreational facilities to segregated private schools. The city's action was held to violate an existing parks desegregation order by depriving black citizens of their right of equal access to the city's parks and recreational facilities. (*Id.* at pp. 567-569.) It also contravened an outstanding school desegregation order, since the attractiveness of the segregated schools was enhanced, the resulting capital savings could be used by the schools for other purposes, and the schools received an opportunity to operate concessions which generated revenue.

The *Gilmore* decision explained that the concept of "exclusive" use was "helpful not so much as a controlling legal principle but as a description of a type of use and, in the context of this case, suggestive of a means of allocating public recreational facilities. The term 'exclusive use' implies that an entire facility is exclusively, and completely, in the possession, control, and use of a private group. It also implies, without mandating, a decision-making role for the city in allocating such facilities among private and, for that matter, public groups. [¶] Upon this understanding of the term, we agree with petitioners that the city's policy of allocating facilities to segregated private schools . . . created, in effect, 'enclaves of segrega-

tion' and deprived petitioners of equal access to parks and recreational facilities." (417 U.S. at p. 566; fn. omitted.)

Gilmore remanded so additional evidence could be taken on the question of whether there was sufficient state action to justify enjoining nonexclusive use of the facilities by the segregated schools or all uses by segregated groups which were not connected to schools. In analyzing the question of the applicability of *Burton* and *Moose Lodge* to the nonexclusive use of park facilities by private organizations, the court stated: "Because the city makes city property available for use by private entities, this case is more like *Burton* than *Moose Lodge*. The question then is whether there is significant state involvement in the private discrimination alleged." (*Gilmore v. City of Montgomery, supra*, 417 U.S. at p. 573.) A finding of state action would be improper if based simply on the mere use by private segregated groups of public facilities open to everyone, such as zoos, museums and parks. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." (*Id.* at p. 574.) In its conclusion, the court cautioned that "any denial of access to public facilities must withstand close scrutiny and be carefully circumscribed.[4] (*Id.* at p. 575.)

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[4]Four concurring justices thought a remand was unnecessary as there was sufficient evidence of state action regarding private groups. Justice White, concurring in the judgment, stated: "It may be useful also to emphasize that there is very plainly state action of some sort involved in the leasing, rental, or extending the use of scarce city-owned recreational facilities to private schools or to other private groups." (*Gilmore, supra*, 417 U.S. at p. 582.)

We glean the following points from the preceding cases:

(1) State action was present in *Burton* through the symbiotic relationship between the private restaurant and the public parking facility in which the restaurant leased space, notwithstanding the failure of the lease to contain a provision precluding discrimination.

(2) State action was present in *Moose Lodge* to the extent that the facially neutral liquor board regulation's application to the private club's racially discriminatory constitution and bylaws invoked the sanctions of the state to enforce the concededly discriminatory private rule.

(3) Under *Gilmore*, the state may not ration use of limited recreational facilities to a private organization which discriminates.[5]

It is evident that the facts here fall somewhere between those of *Burton* and *Moose Lodge*. We have a private club which was conducting its activities in part on land leased from the state.

In our view, the *Gilmore* concept of the allocation of limited recreation facilities is at the heart of the trial court's finding of state action. The Club incorrectly maintains that the trial court relied solely upon the factor of the lease instead of looking at the total circumstances. In

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[5]It is interesting to note that Justice Douglas' dissent in *Moose Lodge* implicitly recognized the rationing concept. According to the dissent, the state's licensing policy was actually restricting the ability of Blacks to obtain liquor while encouraging discrimination, since the quota of available liquor licenses had been filled for years, liquor was available for many hours during the week only at private clubs, and private clubs were unlikely to thrive without such licenses. (*Moose Lodge, supra*, 407 U.S. at pp. 182-183.)

fact, the trial court made the following findings: "In the case before the court, there is in part the question of the use of property, the fee title of which is owned by the state, leased by the Jonathan Club. That property is immediately adjacent to the most heavily used public beach in the State of California. It is also immediately adjacent to the property owned by the Jonathan Club, and is to be exclusively utilized by Jonathan Club members during the term of the lease. [¶] . . . Under these circumstances, the use of the property does involve state action, and the Fourteenth Amendment does apply."

The fact that the public is excluded from needed, otherwise usable public beach is a crucial factor to the determination of state action, and distinguishes this case from *Golden v. Biscayne Bay Yacht Club* (5th Cir. 1976) 530 F.2d 16, upon which the Club relies.

In *Golden*, two men, one Black and one Jewish, brought a federal civil rights action against a private club which had never had any Black or Jewish members. The club was a genuinely private organization which received no funds from any public source and had existed prior to incorporation of the city. The city asserted title in 1962 to the bay bottoms under the Club-constructed and Club-maintained dock facilities which were connected to the Club's land on shore. The Club thereafter leased the bottom land from the city for a fee of $1 per year. The existence of the lease was the sole participation by the City of Miami in the operation of the Club.

Based on the lease, the district court in *Golden* found sufficient state action to justify ordering the Club to cease barring the membership of applicants solely on account of race and religion. The fifth circuit, sitting en banc, reversed on the ground that as a matter of law the facts fell "short of establishing that the City of Miami has so far

insinuated itself into a position of interdependence with the Club that it must be recognized as a joint participant in the internal membership policies of the Club." (*Id.* at p. 22.) *Golden* is not controlling here. Further, there was no evidence in *Golden* that the Club's use of the bottom lands in any way limited or interfered with the citizens' use of public waters. In contrast, the leased land here is a sizeable portion of accessible sandy beach from which the public is excluded. By permitting the Club to offer its members a state-owned portion of the limited amount of available beach at Santa Monica, the state increased the desirability of Club membership and, presumably, the value of the beach facility itself.

Moreover, while *Golden* involved nominal rent of $1 per year, the lease here requires the Club to pay over $40,000 per year. The payment of rent is a significant factor in the state action equation. (*Burton v. Wilmington Parking Authority, supra,* 365 U.S. at p. 723.)

The Commission also maintains that state action is present under the equal protection clause of the state Constitution. (Cal. Const., art. I, § 7, Subd.(a).)[6] We agree. While the state and federal equal protection safeguards are substantially equivalent (*Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596, fn. 11), and state action

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[6]California Constitutuion, article 1, section 7, subdivision (a) provides in pertinent part: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. . . ."

is necessary under both (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 468), state action may exist under the state provision where it is not recognized under the federal. "[A]lthough our court will carefully consider federal state action decisions with respect to the federal equal protection clause insofar as they are persuasive, we do not consider ourselves bound by such decisions in interpreting the reach of the safeguards of our state equal protection clause. As article 1, section 24 of the California Constitution explicitly declares: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co., supra,* at p. 469; *Motors Ins. Corp. v. Division of Fair Employment Practices* (1981) 118 Cal.App.3d 220.)

Past decisions in this state which have construed the "separate and distinct" state equal protection safeguard have recognized "the importance of interpreting the provision in light of the realities of the continuing problems faced by minorities today." (*Price v. Civil Service Com.* (1980) 26 Cal.3d 257, 284-285; *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 301-302.) The condition imposed by the Commission here was aimed at those realities.

The preceding state action analysis convinces us that state action has been established in this case under the state Constitution as well as the federal Constitution.

The Commission and amici briefs also argue for the first time on appeal that the trial court's finding is further supported by *Roberts v. United States Jaycees* (1984) 468 U.S. 609, and *Bd. of Dirs. of Rotary Int'l. v. Rotary Club* (1987) ____ U.S. ____ [95 L.Ed.2d 474]. Those cases involved local club chapters which challenged discriminatory policies of their parent organizations through state

laws prohibiting invidious discrimination by public accommodations or business establishments. Factors like size, purpose, policies, selectivity and congeniality showed that the clubs were not the kind of relationships warranting the constitutional protection for freedom of association. (*Roberts, supra,* at p. 620; *Bd. of Dirs. of Rotary Int'l., supra,* 95 L.Ed.2d at pp. 484-485.) Similarly, *N.Y.S. Club Ass'n. v. City of New York* (1987) 505 N.E.2d 915 (probable jurisdiction noted, *New York State Club Assn. v. New York* (1987) ____ U.S. ____ [98 L.Ed.2d 26, 108 S.Ct. 62]), involved the constitutionality of a New York City ordinance prohibiting discrimination by large private clubs of specified characteristics. Unfortunately, the record here does not contain sufficient details about the Jonathan Club to afford us the opportunity to engage in that kind of analysis. All the Commission knew about the Club was that it owned and operated a facility at Santa Monica State Beach, proposed a development which included a sizeable block of leased state land, was reputed to practice discriminatory membership policies, and refused to discuss the issue. We have approached the case on that basis.[7]

We therefore conclude that there was sufficient entanglement with the state under the equal protection clauses of the federal and state Constitutions to justify the finding of state action which permits imposition of the membership condition.

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[7]We note, however, that *Roberts* recognized both a compelling state interest in eradicating discrimination and the state's broad authority to create rights of public access. (468 U.S. at pp. 623-625.)

II

The Club also argues that the Commission lacked statutory authority to impose the membership condition. We disagree.

The California Coastal Act of 1976 is the product of a detailed study by the California Coastal Zone Conservation Commission. That study resulted in "a plan for the orderly, long-range conservation, use, and management of the natural, scenic, cultural, recreational, and manmade resources of the coastal zone." (Pub. Resources Code. § 30002; 3 Witkin, Summary of Cal. Law (8th ed. 1984 supp.) § 39A, pp. 155-157.)

The access provisions of the act follow the constitutional mandate of article X, section 4 of the California Constitution, which was adopted on June 8, 1976. It provides: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof." (See comment, Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights (1981) 28 UCLA L.Rev. 1049, 1067.)

One of the stated goals of the act is to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and consti-

tutionally protected rights of private property owners." (Pub. Resources Code, § 30001.5, subd. (c).)

Section 30210, upon which the trial court relied, provides: "In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."

We agree with the trial court that the membership condition here was authorized by the Coastal Act. The condition ensures that, for the period of time the Club has exclusive use of public property at the beach, no member of the public will be excluded from access to that land based on invidious discrimination in Club membership policies.

The Commission's action was further supported by the Government Code.

Government Code section 54091 states: "Any city, county, or other local agency which owns, operates, or controls any public beach shall allow the use of such public beach by all persons regardless of color, race, religion, ancestry, sex, national origin, or residence. . . ." And Government Code section 54092 provides: "Any city, county or other local agency which allows any property owned, operated or controlled by it to be used as a means of access to any public beach shall allow free access over such property to all persons regardless of color, race, religion, ancestry, sex, national origin or residence." While we have located no cases construing those sections, it is apparent that access to the public beach by all of our citizens is of paramount importance to the Legislature.

We recognize that under the United States Supreme Court's recent decision in *Nollan v. California Coastal Com'n* (1987) ____ U.S. ____ [97 L.Ed.2d 677], there are limitations on the type of condition the Commission may impose. We see nothing in *Nollan* to preclude the condition at issue here.

Nollan held that the takings clause of the Fifth Amendment was violated where the commission required a private property owner to grant a beachfront easement to the public as a condition for obtaining a building permit for a single-family home. In contrast, the instant case involved neither the granting of an easment nor the takings clause, and includes public land in the plans for the proposed development.

Indeed, there is language in *Nollan* which supports the membership condition imposed here. *Nollan* states that the Commission's "assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." (97 L.Ed.2d at p. 689.) The majority opinion (four justices dissented) went on to find no rational connection between the expressed governmental purpose of visual access from the roadway and the imposed condition requiring lateral access along the coastline.

Here, in contrast, there is a direct connection between the governmental purpose of maximizing public access to state beach lands and the condition which was imposed. Again, by precluding discrimination against minorities in the Club's membership policies, the Commission maximized the possibility that all segments of the public will have access to the leased land.

III

The Club further maintains that the Commission lacked jurisdiction to impose the condition because the leased portions of the project are part of the 1984 boundary settlement, and section 30416, subdivision (c) of the Coastal Act excludes boundary settlements from the Commission's purview.

Pursuant to Public Resources Code section 30600, "any person wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit."

"Development" is broadly defined by section 30106, and includes, inter alia, "construction, reconstruction, demolition, or alteration of the size of any structure. . . ." However, section 30416, subdivision (c) contains the following exclusion: "Boundary settlements between the State Lands Commission and other parties and any exchanges of land in connection therewith shall not be a development within the meaning of this division."

The boundary line agreement which is part of the 1984 settlement is signed by the president of the Club, the Governor of California, and the Executive Officer of the State Lands Commission, among others.

In finding section 30416, subdivision (c) to be inapplicable, the trial court found: "That code section refers to an agreement as to the location of a boundary between two pieces of property. Similarly, the reference to an exchange of lands refers to a transfer of one piece of land in exchange for another. Other matters which may be included in boundary line agreements or land exchanges are not excluded from the jurisdiction of the Coastal Commission. There was nothing in the documents presented to the court in this case which provided to the

contrary. Nothing in the documents precluded the Coastal Commission from exercising jurisdiction over the property in question." The court further stated at the hearing that the section meant a coastal permission permit was not required for the boundary agreement itself as opposed to subsequent development. We agree with and adopt that reasoning.

The State Lands Commission has long been empowered to establish the boundary line for the tidelands through agreement, arbitration, or an action to quiet title. (Pub. Resources Code, § 6357.) Enactment of the Coastal Act was not intended to "increase, decrease, duplicate or supersede the authority of any existing state agency." (§§ 30401, 30400.) Section 30416, subdivision (e) avoids such overlap by indicating that a Coastal Commission permit is unnecessary for boundary line activity by the State Lands Commission. The section cannot be read to mean the State Lands Commission can assume the Coastal Commission's responsibility for regulating land use and development within the coastal zone. Indeed, the State Lands Commission itself could not undertake a development without obtaining Coastal Commission approval. (Pub. Resources Code, §§ 30111, 30600; see *City of Coronado v. California Coastal Zone Conservation Com.* (1977) 69 Cal.App.3d 570.)

Nothing in the settlement documents suggests that the involvement of the State Lands Commission obviated the need for a development permit from the Coastal Commission.

The Club emphasizes that the leases granted it "exclusive use" of the leased parcels and expressed the Club's intention to relocate two paddle tennis courts, install a flower bed, and use at least one and possibly three of the parcels for parking. It further provided that

the relocated paddle tennis courts and flower bed "shall be deemed approved by the State and City concurrently with the execution of this Agreement." Other provisions of the lease make it clear, however, that before beginning work on the leased parcels, the Club was "required to obtain, at its own expense, any necessary permits from the City and other appropriate public agencies for doing the work." The Coastal Commission permit was one such necessary permit.

IV

Finally, the Commission argues that the membership condition breaches the 1984 settlement agreement, as the state and city did not raise the issue at that time and granted an "exclusive" lease.

There is no question that the boundary line agreement was binding upon the state. "Whenever the [State Lands Commission], pursuant to authority granted to it by law, enters into any agreement for the compromise or settlement of claims, the agreement shall be submitted to the Governor, and if approved by him shall thereupon, but not before, be binding upon the State and the other party thereto." (Pub. Resources Code, § 6107.)

We find that, just as in *Burton v. Wilmington Parking Authority, supra,* 365 U.S. at page 725, the fact that the initial lease with the state lacked a nondiscrimination condition did not preclude subsequent imposition of such a condition when the omission was belatedly recognized. Faced with the possibility of invidious discrimination on public property here, which the Club refused to deny, the Commission properly avoided placing the state's "power,

property and prestige" behind the Club's reputed membership policy.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

WOODS, P.J.

We concur:

McCLOSKY, J.

GEORGE, J.

APPENDIX B

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 4, No. B018588
S004379

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CLUB

v.

CALIFORNIA COASTAL COMMISSION

Filed: May 5, 1988 Laurence P. Gill, Clerk

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed January 14, 1988, which appears at 197 Cal.App.3d 884. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

MALCOLM LUCAS
Chief Justice

APPENDIX C

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 4 DATE: 02/03/88

Macdonald, Halsted & Laybourne
John R. Shiner
725 South Figueroa Street
Citicorp Plaza-36th Floor
Los Angeles, California 90017

RE: Jonathan Club
vs.
California Coastal Commission, *Et Al.*
2nd Civil B018588
Los Angeles, No. C563602

THE COURT:

Petition for rehearing denied.

APPENDIX D

Conformed Copy

2ND CIVIL No. B018588

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FOUR

JONATHAN CLUB,
Petitioner and Appellant,

vs.

CALIFORNIA COASTAL COMMISSION,
Respondent and Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appeal from the Superior Court of Los Angeles County
Honorable Norman R. Dowds, Judge

BAKER & MCKENZIE
JOHN R. SHINER
JANET A. KOBRIN
Citicorp Plaza, Thirty-Sixth Floor
725 South Figueroa Street
Los Angeles, California 90017
Telephone: (213) 629-3000
Attorneys for Petitioner and Appellant Jonathan Club

Notice is hereby given that Jonathan Club, the Petitioner and Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the California Court of Appeal, Second Appellate District, affirming a judgment against Appellant, entered in this action on January 14, 1988. Review of that judgment was denied by the California Supreme Court on May 5, 1988.

This appeal is taken pursuant to Title 28, Section 1257, subdivision (2) of the United States Code.

DATED: July 26, 1988

BAKER & MCKENZIE
JOHN R. SHINER
JANET A. KOBRIN

By: /s/ JOHN R. SHINER
JOHN R. SHINER
Attorneys for Petitioner and Appellant Jonathan Club

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the County aforesaid; I am over the age of 18 and not a party to the within action; my business address is 725 South Figueroa Street, Thirty-Sixth Floor, Los Angeles, California 90017.

On July 26, 1988, I served the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the interested parties by placing a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid in the United States mail at Los Angeles, California addressed as follows:

Honorable Norman R. Dowds
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012

John K. Van De Kamp, Attorney General
State of California
Department of Justice
110 West A Street, Suite 700
San Diego, California 92101

Clerk
Court of Appeal of the State of California
Second Appellate District, Division Four
3580 Wilshire Boulevard
Los Angeles, California 90010

Anthony M. Summers
Deputy Attorney General
State of California
Department of Justice
110 West A Street, Suite 700
San Diego, California 92101

Betsy Rosenthal
Anti-Defamation League of B'nai B'rith
6505 Wilshire Boulevard, Suite 814
Los Angeles, California 90048

Frederic D. Woocher
Center of Law in the Public Interest
10951 West Pico Boulevard, 3rd Floor
Los Angeles, California 90064

Clerk
California Supreme Court
3580 Wilshire Blvd., Suite 213
Los Angeles, California 90010

Executed on July 26, 1988, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ JUDITH A. PAGET
Judith A. Paget

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. The Fourteenth Amendment to the United States Constitution, Section 1, provides, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

4. The "Contract Clause" of the United States Constitution (art. I, § 10, cl. 1) provides, in relevant part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

5. Article X, § 4 of the California Constitution provides, in relevant part:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a

harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

6. Section 30001.5 of the California Public Resources Code provides, in relevant part:

"The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:

(a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.

(b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.

(d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.

(e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutu-

ally beneficial uses, including educational uses, in the coastal zone."

7. Section 30210 of the California Public Resources Code provides, in relevant part:

> "In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."

8. Section 30301 of the California Public Resources Code provides, in relevant part:

> "The [California Coastal] commission shall consist of the following 15:
>
> (a) The Secretary of the Resources Agency.
>
> (b) The Secretary of the Business and Transportation Agency.
>
> (c) The Chairperson of the State Lands Commission.
>
> (d) Six representatives of the public, who shall not be members of any regional commission, from the state at large. The Governor, the Senate Rules Committee, and the Speaker of the Assembly shall each appoint two of such members.
>
> (e) Six representatives from the regional commissions, selected by each regional commission from among its members."

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 29, 1988, I served the within Jurisdictional Statement in re: "Jonathan Club vs. California Coastal Commission" in the United States Supreme Court, October Term 1988, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Honorable Norman R. Dowds
Los Angeles Superior Court
111 North Hill St.
Los Angeles, CA 90012

John K. Van De Kamp
Attorney General
State of California
Department of Justice
110 West A St., Suite 700
San Diego, CA 92101

Clerk
Court of Appeal of the
State of California
Second Appellate District,
Division Four
3580 Wilshire Blvd.
Los Angeles, CA 90010

Anthony M. Summers
Deputy Attorney General
State of California
Department of Justice
110 West A St., Suite 700
San Diego, CA 92101

Betsy Rosenthal
Anti-Defamation League
of B'nai B'rith
6505 Wilshire Blvd.
Suite 814
Los Angeles, CA 90048

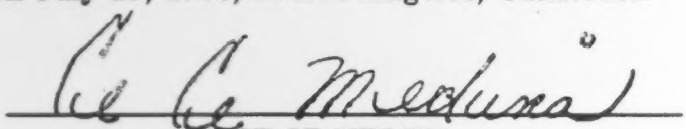
Frederic D. Woocher
Center of Law in the
Public Interest
10951 W. Pico Blvd.,
3rd Floor
Los Angeles, CA 90064

Clerk
California Supreme Court
3580 Wilshire Blvd., Rm. 213
Los Angeles, CA 90010

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on July 29, 1988, at Los Angeles, California.



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